United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

75-4054

United States Court of Appeals

For the Second Circuit.

VIOLA CHOW,

Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For Review Of
Administrative Agency Action

REPLY

BRIEF OF PETITIONER

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UNITED STATES COURT OF APPEALS
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VIOLA CHOW, :

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ARGUMENT

I. DISCUSSION OF RESPONDENT'S BRIEF

The respondent offers no refutation to any point presented in petitioner's brief and disputes no case cited by petitioner.

Respondent errs in its "statement of the case". Petitioner not only petitions this Court for review of a final order of deportation entered by the Board on February 13, 1975, but also petitions for a review of the final order of deportation entered by the Board of Immigration Appeals on August 2, 1974 dismissing the appeal. (pp. 2, 8, 9, 10 and 15 of the petitioner's brief).

II. THE FIRST AND SECOND ISSUES PROPOUNDED BY RESPONDENT DO NOT EXIST IN THIS CASE

Respondent, in its statement of the issues (items 1 and 2), presents to this Court the question whether the Board abused its discretion. This is not the issue. We contend that it was mandatory for the Board to reopen the case and remand it to the Immigration Judge for further proceedings consist-

ent with the requirements of the Immigration and Naturalization Law, the Regulations of the Attorney-General and the Administrative Procedure Act. This Court has the power to do so, despite the refusal of the Board. The Respondent does not contest the factual basis for our claim.

1. We do not ask that this Court substitute its judgment for that of the Attorney General. We ask only that a fair hearing be conducted, necessarily before the Special Inquiry Officer (Immigration Judge).

A) The Board of Immigration Appeals has arrogated to itself the trial functions of the Immigration Judge. The Regulations do not permit this. Section 242.8 provides:

> (a) Authority. In any proceeding conducted under this part the special inquiry officer shall have the authority to determine deportability and *** to order temporary withholding of deportation pursuant to section 243(h) of the Act, and to take any other action consistent with applicable provisions of law and regulation as may be appropriate to the disposition of the case. A special inquiry officer shall have authority to certify his decision in any case to the Board of Immigration Appeals when it involves an unusually complex or novel question of law or fact. Nothing contained in this part shall be construed to diminish the authority conferred on special inquiry officers by the Act.

No such certification was made to the Board of Immigration Appeals by the Special Inquiry Officer.

B) The concealment of the file of Lei Choun Hsu by the Immigration Service undermined the functions of the Immigration Judge.

At the conclusion of the hearing, the Immigration Judge specifically retained jurisdiction so that he could evaluate the significance of that case. He said, at pages A-37 and A-38:

"*** I will give you a period of thirty days to find the whatever it is - the criminal case that you referred to and to present that in writing. Whatever you do have in the way of documentary evidence relating to this matter, present that, together with a memorandum of law as to all of your contentions in regard to the application for 243(h), and an offer of proof with regard to this criminal record, whatever it is, as to exactly what you would proove on further hearing is held with regard to that particular case, whatever it involves. If on the basis of the documents that you submit I consider that a further hearing is required, I will reconvene the hearing on notice only, following the receipt of your documentation and the government will have an opportunity to present any reply or further evidence if it so chooses by notifying me."

The Immigration Service, by concealing the Lei Choun Hsu file, prevented an independent judgment by the Immigration Judge, and vitiated his determination.

As stated by the Supreme Court in Yellin v. United States. 374 U.S. 109, at page 121:

"The same result should obtain in the case at bar. Yellin might not prevail, even if the Committee takes note of the injury to his reputation or his request for an executive session. But he is at least entitled to have the Committee follow its rules and give him consideration according to the standards it has adopted in Rule IV."

This statement applies with equal force to the refusal of the Board to hear oral argument and to permit the filing of a brief, in violation of its own Regulations.

III. DAVID L. MILHOLLAN'S PRESENCE ON THE BOARD THAT DECIDED THE MOTION TO REOPEN, AS ITS CHAIRMAN, WAS A VIOLATION OF DUE PROCESS

It has not been disputed by Respondent that the Administrative Procedure Act applies to the actions of the Board of Immigration Appeals. Indeed there can be no such dispute. (cf Shaughnessy v. Pedreiro, 349 U.S. 48).

The Administrative Procedure Act (5 U.S.C. 554.(d) provides in pertinent part:

> "An employee or agent engaged in the performance of *** prosecuting functions for an agency may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review ***."

The purpose of the Act was to prevent just what happened in this case. [cf International Brotherhood v. NLRB, (CA 7, 1973) 486 F. 2d 863; Twigger v. Schultz, CA 3, 1973) 484 F. 2d 856].

Combining in one person the function of advocacy with the function of deciding is an evil which has been roundly condemned, and which deprives the person of procedural due process. (Wong Yang Sung v. McGrath, 339 U.S. 33, 50-53.)

In addition to the foregoing, Mr. Milhollan's presence as Chairman of the Board that decided the motion deprived the petitioner of her constitutional right to a fair hearing on two other grounds:

1. Mr. Milhollan's strong position against reopening the proceedings constituted prejudgment.

2. His voting as a member of the Board when he was not a member of the Board that heard oral argument (A-87) invalidated the determination of the Board, we respectfully submit.

IV. PETITIONER WAS NOT PERMITTED TO EXAMINE THE FILE

Respondent has now taken the position in its brief that petitioner was permitted to examine the files of Lei Choun Hsu (A-18, A-19). Petitioner's counsel was not permitted to examine these files, and the position of the Immigration Service has been that such examination would not be permitted (A-92, A-95). Also, at the Pre-argument hearing, respondent took the position that an examination of the files could properly be refused. We need not cite the Freedom of Information Act, or the Regulations of the Attorney General, or the Administrative Procedure Act as authority that we could have access to these files. The Special Inquiry Officer specifically directed that the file be made available to petitioner.

We charge (completely consistent with the stated position of the respondent) that these files deliberately have been withheld from us, despite the direction of the Special Inquiry Officer.

This also constitutes a denial of a fair hearing.

V. IN VIEW OF THE EXTREME SEVERITY OF THE HARDSHIP IMPOSED UPON PETITIONER BY DEPORTATION EVERY OPPORTUNITY SHOULD BE GRANTED TO HER TO PROVE HER CONTENTION OF PERSECUTION

At page 15 of its brief, the respondent draws improper conclusions, and even goes outside the record to attempt to impugn petitioner's claim.

Contrary to the statement of the respondent, there is evidence in the record to establish that petitioner's political views are known to the Taiwan government (A-51). In addition, permission must be obtained from the

Taiwan government so that petitioner may be deported there. We believe that ordinarily the deportees'political views become known during the course of such proceedings.

It is conceded that the petitioner entered the United States in diplomatic status (A-5). Her obtaining permanent residence here and refusal to return to Taiwan is a virtual defection, and puts her in a special category.

The statement is made that "her brothers apparently resided in Taiwan until recently without any interference". This "fact" not only does not appear in the record, but is false. The petitioner's three brothers and one sister have been here for considerable periods, with the minimum period being approximately six years. All are citizens or are about to be granted citizenship. Her mother is here as a permanent resident. Her two children are both American citizens, having been born here, and depend upon her for support. They are supported by petitioner and would undergo the most extreme hardship if they had to go to Taiwan, since neither of them is too conversant with Chinese. (A-4, A-8, A-31, A-42).

This Court may take judicial notice that the Taiwan government is a totalitarian government, with extreme views towards those who support our government's official policy toward Red China.

In view of all these facts and in view of the extreme hardship that would result to her American citizen children, petitioner should be given the benefit of every opportunity to prove her case. Her rights should not be foreclosed in any way. She should be given the benefit of every regulation and statute which would help her. We have amply demonstrated, without dispute by the respondent, that many of these rights have been taken away from her.

VI. THE DEPARTMENT OF STATE BASED ITS RULING UPON ERRONEOUS "FACTS" GIVEN TO IT BY THE IMMIGRATION SERVICE

Refusal of the Immigration Department to permit petitioner's attorney to inspect the files of Lei Choun Hsu and the letter of the State Department dated June 3, 1974 (A-51) resulted in extreme prejudice to the petitioner. The State Department Director of the Office of Refugee and Migration Affairs based her opinion upon incorrect information given to her by the Immigration Department. It is petitioner's claim, and indeed the file of Lei Choun Hsu will confirm this, that she would be either imprisoned or executed (with or without a trial) solely by reason of her conviction in the United States. It would indeed constitute double jeopardy (a fear voiced by the State Department) and she would be convicted for a crime over which the Taiwan government would have no jurisdiction (the State Department assumed facts directly contrary to this based on the information received from the Immigration Department).

The opinion (A-52) closed with the following Statement:

> "Unless Ms. Chow can provide more substantial evidence to support her claim, we are unable from the information thus far submitted to conclude that she should be exempted from regular immigration procedures on the grounds that she would suffer persecution on account of race, religion, nationality, political opinion, or membership in a particular social group should she return to the Republic of China. Should Ms. Chow present additional information which to the Service seems to require further review, we will be pl sed to give further consideration to the case."

The refusal of the Immigration Service to permit petitioner's attorney to examine this pertinent file or even to notify petitioner that she had the right to present further proof is not only a violation of procedural rights, but constitutes an act which offends the tradional American concept of justice and fair play.

VII. THE QUESTION OF CRUEL AND UNUSUAL PUNISHMENT

We are fully aware of the cases which hold that deportation in and of itself is not cruel and unusual punishment. However, under the peculiar and unusual facts of this case, we respectfully submit that deportation would constitute cruel and unusual punishment. The petitioner has attempted to show, and has been prevented by the illegal actions of the Immigration Service from showing, that if she is deported to Taiwan she will be imprisoned or executed without trial solely by reason of conviction in the United States and her political beliefs. We respectfully urge that sending a young to certain death or imprisonment in a totalitarian country (based upon her activities in this country) would be cruel and unusual punishment.

CONCLUSION

The case should be remanded to the Immigration Judge for proceedings consistent with the views expressed herein.

Respectfully submitted,

IRVING E. FIELD
Attorney for Petitioner